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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re S.M. et al., Persons Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

MARCOS M.,

Defendant and Appellant.

G040290

(Super. Ct. No. DP015094)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, James P.
Marion, Judge. Affirmed.

Merrill Lee Toole, under appointment by the Court of Appeal, for
Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen, Senior
Deputy County Counsel, and Jeannie Su, Deputy County Counsel, for Plaintiff and
Respondent.

No Appearance for the Minors.

Marcos appeals from an order sustaining the jurisdictional petition of the Orange County Social Services Agency (SSA), and declaring his daughter, S.M., and his sons, N.M and E.M., dependents of the juvenile court. Marcos argues the evidence was insufficient to sustain the allegations of the petition. We disagree. The petition alleged Marcos had engaged in acts of physical abuse of his two stepchildren, sexual abuse of his stepdaughter, domestic abuse with his wife, and that he and his wife had failed to protect both the stepchildren and their own children, who had been placed at risk of harm. The allegations of sexual abuse were directly supported by the testimony of the two stepchildren. On appeal, Marcos is argues simply that those stepchildren should not have been believed, which is an attack on the weight of their testimony, rather than its sufficiency. Such an argument cannot be entertained on appeal.

Marcos also contends the juvenile court erred in overruling his objections to portions of SSA's reports, and considering the hearsay evidence of his criminal record which was included therein. He asserts that the reports contained the sole evidence in support of the allegation he had a 15-year-old criminal conviction for unlawful sexual intercourse with a minor.¹ We conclude that even assuming Marcos' argument was legally correct, the error was clearly harmless. Given its vintage, Marcos' prior conviction could not have played a significant role in determining whether he posed a current risk of harm to the children in the home. Instead, as the juvenile court made clear, it was the direct evidence from the stepchildren, about Marcos' recent conduct, which the court found persuasive. That evidence was more than sufficient to justify the conclusion that other children in the home were at risk of similar harm. We have no

¹ Marcos identifies two separate allegations as unsupported – b-6, which asserts the existence of the prior criminal record, and d-5, which asserts that the stepchildren had disclosed the fact of the sexual abuse to their mother during a specific time period. However, as SSA points out in its brief, Marcos only discusses the criminal record issue in his argument. We consequently assume, as did SSA, that what Marcos actually intended to challenge were allegations b-6 and d-6, which *both* recite the existence of the criminal record.

doubt the court would have reached that same conclusion even in the absence of any evidence Marcos had a prior record.

The order is affirmed.

FACTS

All five children living in Marcos' home were detained pursuant to a jurisdictional petition filed on April 4, 2007. At that time, Marcos' stepdaughter, V.C., was 13, his stepson, A.C., was 12, his daughter, S.M., was 10, and his sons, N.M. and E.M., were 8 and 5 respectively. The petition alleged that Marcos had physically abused his two stepchildren, that the children's mother had been aware of the abuse and failed to protect them, and that Marcos' own children were at risk of similar abuse. The petition further alleged that Marcos had sexually abused his stepdaughter, that the stepson had witnessed the abuse which was then disclosed to their mother, and that Marcos' own children were at risk of similar abuse. Finally, the petition alleged that Marcos and the children's mother had a history of domestic violence, that both had histories of substance abuse, and that Marcos had been arrested on a drug related charge in February of 2007.

The petition alleged that jurisdiction was appropriate based upon claims that (1) that the children have suffered, or are at substantial risk of suffering, serious physical harm inflicted non-accidentally upon them by their parent (§ 300, subd. (a))²; (2) that the children have suffered, or are at substantial risk of suffering serious physical harm or illness due to the parent's failure to protect (§ 300, subd. (b)); and (3) that the children have been sexually abused, or are at substantial risk of being sexually abused (§ 300, subd. (c).)

The sexual abuse allegation came to light after A.C. was sent to live with his father approximately a month before the petition was filed. A.C. told his father he wished to return to the mother's home because he wanted to protect V.C. from Marcos'

² All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

sexual abuse. A.C. also reported that Marcos had told him he abused V.C. because he had been abused himself as a child. V.C. was also sent to live with her father about a week before the case was referred to SSA, after reportedly calling her mother a disparaging name.

When interviewed by SSA just prior to the filing of the petition, V.C. reported that Marcos had touched her on her chest, on top of her clothes, on two separate occasions, but that Andrew had seen Marcos touch her on other parts of her body while she was asleep. V.C. stated she was a heavy sleeper, and had been unaware of Marcos doing that. However, she also reported, in an interview with police, that she would sometimes wake up and find Marcos next to her in her bed. Although her mother did tell Marcos to stay out of V.C.'s room, she did not tell him to leave the house entirely. V.C. a year earlier – in which Marcos had lifted V.C. up, pressed her body against his, and then lowered her to the floor in a manner allowing her to feel his erect penis – but the mother had not taken any significant steps to prevent it from happening again.

A.C. was also interviewed by SSA, and reported seeing Marcos with V.C. while she was sleeping. He saw Marcos touch V.C. on her chest, and in her vaginal and buttocks areas. A.C. stated that he had told his mother of the touching, and she responded that it was “not right” and told A.C. to “keep an eye on him.”

V.C. and A.C.'s father disclosed that when he discussed the sexual abuse issue with their mother, she dismissed the concern as insignificant. However, the mother allegedly did confront Marcos with the allegation after he was incarcerated. He denied it.

The family was the subject of three prior referrals to SSA. The first, in 2003, alleged general neglect, but was unsubstantiated. The second report, in February of 2006, included allegations of physical abuse of V.C. and A.C. by Marcos, domestic violence, and drug use by both Marcos and the children's mother. The mother was given voluntary services, and Marcos moved out of the home for most of the duration of the

case. The voluntary services ceased in October of 2006, shortly after Marcos moved back into the home, with no further problems reported.

The third referral was also in February of 2006, and also stemmed from an allegation of physical abuse of V.C. That case was treated as a “duplicate referral” with allegations overlapping those in the second case.

After being detained in the instant case, S.M, N.M. and E.M. were placed in foster care, and then placed in the home of a maternal uncle and aunt. V.C. and A.C. were released to their father’s care.

The children’s mother was interviewed about the allegations of the petition prior to the jurisdiction and disposition hearing, and essentially conceded the truth of most of the allegations. She acknowledged that the children had been physically abused by Marcos on several occasions, and that her marital relationship with him had been plagued by repeated domestic violence. She described Marcos as a “bully.” She acknowledged that both she and Marcos had a history of substance abuse, and that his drug abuse was ongoing. The mother also stated she believed the allegations of V.C.’s sexual abuse but denied having had any knowledge of the sexual abuse until February 14, 2007.

Marcos was released from jail on the drug charge in early April of 2007, and placed in a Salvation Army treatment program. However, he was kicked out of the program in early May of 2007, and on May 29, 2007, he was arrested on charges stemming from his alleged abuse of V.C.

In the wake of his arrest, Marcos denied to police that he had engaged in any sexual or physical abuse, although he acknowledged he had at times been “heavy handed” in physical discipline. With respect to the sexual abuse issue, he stated his actions had been “misunderstood,” even by the children’s mother, who had informed him at one point that his conduct with V.C. was inappropriate. However, as he explained, the real problem was that his relationship with V.C. had eroded, and she would push him

away and reject him during the daytime, which caused him to want to hold her during the night while she slept – at a time when she couldn’t push him away. He claimed he wanted V.C. to feel safe with him and to know that he could be trusted. So he sometimes crawled into V.C.’s bed at night, while wearing “pants, shorts or boxers,” so that he could “hold” her. He denied touching her in any inappropriate ways during these nighttime hugging sessions. Marcos also admitted to drug use, and opined that his drug use was one of the main causes of the problems within the family.

Although the hearing on the contested issue of jurisdiction and disposition for S.M., N.M. and E.M. was originally scheduled to take place in May of 2007, it was continued numerous times for various reasons. The hearing did not actually commence until March 4, 2008, nearly a year after its initially scheduled date. During the interim, in November of 2007, S.M., N.M. and E.M. were removed from their placement with their aunt and uncle, and moved first to a facility and then to a foster home, because their aunt had simply become too overwhelmed to continue caring for them.

At the beginning of the hearing, SSA moved to admit the social workers’ reports into evidence, but Marcos objected to the court’s consideration of certain information included in the reports. Among other things, Marcos specifically objected to the court’s consideration of his criminal history, which was detailed within several of the reports, on the basis it was hearsay and unsupported by any certified documentation establishing admissible evidence of his record. (§ 355.)³ The court overruled the objection, while noting that “I’m not going to base the decision on his record”

³ Section 355, subdivision (c), provides:

“(c)(1) If any party to the jurisdictional hearing raises a timely objection to the admission of specific hearsay evidence contained in a social study, the specific hearsay evidence shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based, unless the petitioner establishes one or more of the following exceptions:

“(A) The hearsay evidence would be admissible in any civil or criminal proceeding under any statutory or decisional exception to the prohibition against hearsay.

“(B) The hearsay declarant is a minor under the age of 12 years who is the subject of the jurisdictional hearing. However, the hearsay statement of a minor under the age of 12 years shall not be admissible if the objecting party establishes that the statement is unreliable because it was the product of fraud, deceit, or undue influence.

In the course of the hearing, both V.C. and A.C. testified. V.C., who was then 14, testified Marcos had begun touching and hugging her in a manner which made her uncomfortable when she was 12. She said he would sometimes lift her up and slide her down his body, during which she could feel his “private part.” V.C. also stated that on some occasions, Marcos would touch her breast, over her clothes, while sitting next to her watching a movie. She related that on approximately five occasions, she woke up in her bed to find Marcos sleeping next to her. She was unaware of whether he had touched her inappropriately while she slept. She also described an occasion when he had tried to come into the bathroom while she was showering, and when she refused him entry, he went outside and attempted to enter through the window.

V.C. also testified regarding Marcos’ physical abuse, describing how he would “sock [her] and hit [her] with the phone and throw [her] against the floor.” He also smashed her fingers in the cupboard because she didn’t want to do the dishes. V.C. explained that when Marcos got mad, he would try to hit one of the children. She also saw him hit or throw things at her mother.

In his testimony A.C. described seeing Marcos touch V.C. in a sexual manner on two occasions. One time he saw Marcos with a sleeping V.C. in her bedroom, through a partially open door. Marcos crouched down and put his hand under V.C.’s shirt “trying to . . . touch her boobs.” The other time, A.C. was watching television in the living room when he saw Marcos pick up the sleeping V.C. from her room, and move her

“(C) The hearsay declarant is a peace officer as defined by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, a health practitioner described in paragraphs (21) to (28), inclusive, of subdivision (a) of Section 11165.7 of the Penal Code, a social worker licensed pursuant to Chapter 14 (commencing with Section 4990) of Division 2 of the Business and Professions Code, or a teacher who holds a credential pursuant to Chapter 2 (commencing with Section 44200) of Part 24 of Division 3 of Title 2 of the Education Code. For the purpose of this subdivision, evidence in a declaration is admissible only to the extent that it would otherwise be admissible under this section or if the declarant were present and testifying in court.

“(D) The hearsay declarant is available for cross-examination. For purposes of this section, the court may deem a witness available for cross-examination if it determines that the witness is on telephone standby and can be present in court within a reasonable time of a request to examine the witness.

“(2) For purposes of this subdivision, an objection is timely if it identifies with reasonable specificity the disputed hearsay evidence and it gives the petitioner a reasonable period of time to meet the objection prior to a contested hearing.”

to a bed he had in the garage. Once there, Marcos put a blanket over V.C. and let her sleep for awhile. After she was “really asleep,” Marcos “took the sheets off her and then went under there.” A.C., who was sneaking intermittent peeks from where he was in the living room, saw Marcos put his hand under the ankle of her sweatpants, but then looked away. When he looked back, Marcos “was close to getting to her waist.” Marcos saw A.C. looking at them, and then closed the door to the garage. A.C. estimated they remained in the garage for about an hour after that, before Marcos emerged, carrying the still-sleeping V.C., and left her in the living room.

A.C. explained that he did not initially say anything about what he had witnessed, because he was afraid Marcos would get mad. Also, he thought it might be better if he had an opportunity to witness Marcos doing “more stuff” before he told anyone, and then A.C. would “have a lot of stuff to . . . get him into trouble about it.” A.C. agreed he did not like Marcos, and thus had wanted to “build up a case against him.”

A.C. also related an incident, which he had apparently not mentioned previously, in which Marcos had molested him. A.C. stated that when he was eight or nine years old, Marcos had made him “touch him on his thing, on his private part,” while Marcos was unclothed. Marcos told A.C. to “rub him up and down,” which A.C. did. A.C. also testified that on a different occasion, Marcos had told him that Marcos had a problem, because he had been “molested” as a child by his father and brothers.

At the conclusion of the evidence, and after hearing argument from the parties, the court sustained the petition on all three counts. It noted that it found both V.C. and A.C. to be “very credible,” even with respect to A.C.’s apparently belated assertion that Marcos had also molested him on one occasion. The court also pointed out that the allegations of physical abuse had been corroborated by others, including S.M. and N.M., and that Marcos had “a serious, serious drug problem.”

The court declared all three of Marcos' children, S.M., N.M. and E.M., to be dependents of the court, and concluded that the welfare of the children "requires that custody be taken from the father." The court then ordered, however, that custody would remain with the children's mother under the supervision of SSA. The court then continued the matter until September of 2008 for a six-month status hearing, and ordered that Marcos be transported to the hearing if still in custody at that time.

I

Marcos first argues the evidence is insufficient to sustain the allegation he sexually abused V.C. (and apparently A.C. as well). His contentions are not persuasive.

Marcos' challenge to the sufficiency of the evidence is two-fold. He starts by asserting that V.C.'s testimony, standing alone, is insufficient to demonstrate sexual abuse. He characterizes the incidents she personally recalled as innocent – as merely hugging or as momentary, incidental contact, which would not qualify as sexual abuse under Penal Code section 11165.1.⁴ For example, although Marcos acknowledges there was evidence that he touched V.C.'s breasts over her clothes, he argues there was no "*concrete evidence* that [he] actually [did so] for the purpose of sexual gratification." (Italics added.) But of course, "concrete evidence" of subjective intention is very near an

⁴ Penal Code section 11165.1 provides in pertinent part: "As used in this article, 'sexual abuse' means sexual assault or sexual exploitation as defined by the following:

"(a) 'Sexual assault' means conduct in violation of one or more of the following sections: Section 261 (rape), subdivision (d) of Section 261.5 (statutory rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivision (a) or (b), or paragraph (1) of subdivision (c) of Section 288 (lewd or lascivious acts upon a child), 288a (oral copulation), 289 (sexual penetration), or 647.6 (child molestation).

"(b) Conduct described as 'sexual assault' includes, but is not limited to, all of the following:

"(1) Any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen.

"(2) Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person.

"(3) Any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose, except that, it does not include acts performed for a valid medical purpose.

"(4) The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.

"(5) The intentional masturbation of the perpetrator's genitals in the presence of a child."

oxymoron. In virtually every case, the issue of sexual intent is a matter of inference from the circumstances. (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 440.) Here, the evidence demonstrated that Marcos touched V.C.'s breasts on more than one occasion, which strongly suggests the contact was not unintentional. And if the contact was intentional, we are at a loss to explain what purpose – other than sexual gratification – Marcos might have had in mind in doing so. He certainly does not suggest one. Moreover, the fact that Marcos would also sometimes lift V.C. up into the air, and slide her down his body so close that she could feel his erect penis, certainly suggests he had sexual feelings toward her. In light of these circumstances, we have no trouble concluding there was sufficient evidence to support the inference that Marcos touched Vanessa's breasts for the purpose of sexual gratification.

Marcos' second line of attack is on A.C.'s testimony, which includes eye witness accounts of some of the more serious allegations. Marcos insists the testimony is simply too unreliable and incredible to be given any weight. But credibility is an issue for the trial court to determine, and "[i]n dependency proceedings, a trial court's determination will not be disturbed unless it exceeds the bounds of reason." (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564.)

Although Marcos does argue that A.C.'s testimony was so inherently incredible in this case that the court's reliance on it exceeded the bounds of reason, we find the contention unpersuasive. It is not *inherently* implausible that V.C. might have slept through an act of sexual molestation, and evidence that she sometimes awoke when her sister, S.M., got into bed with her does not make it so. It is also not impossible that A.C. was able to see Marcos molesting V.C. in the garage from the living room where he was watching television with his younger siblings, even though those siblings never noticed. After all, A.C. was by that point paying particular attention to Marcos' treatment of V.C.

These arguments concerning the alleged unreliability and inherent implausibility of A.C.'s testimony were laid out in detail for the juvenile court. Despite those assertions, the court expressly concluded that both V.C. and A.C. were credible, and on this record, we cannot disagree.

Finally, we note that Marcos' own statements to police in the wake of his arrest for the sexual molestation constituted persuasive supporting evidence for A.C.'s claims. Although Marcos denied actually molesting V.C., he did acknowledge that he would sometimes crawl into her bed while she slept, wearing only his boxer shorts, so that he could be physically close to her in a way he knew *she would not allow him to be* during her waking hours. That is the very definition of nonconsensual touching, and fairly conclusively demonstrates that Marcos had a rather disturbing view of his "rights" as a stepfather. Marcos also admitted that he had once opened the bathroom window from outside while V.C. was taking a shower, although he claimed it was a "joke," and denied any sexual motive.

Marcos' admission of this highly inappropriate conduct with the adolescent V.C. was sufficient by itself to raise serious red flags, suggesting his view of her was not entirely "paternal." As such, it certainly gives credence to A.C.'s contention Marcos' conduct toward V.C. had in fact been overtly sexual. Consequently, we conclude the evidence, taken as a whole, was more than sufficient to support the juvenile court's findings on the issue of sexual molestation.

II

Marcos also contends the court erred in sustaining what he refers to as "counts" b-6 and d-6 of the petition, which allege that in 1993-1994, Marcos was arrested and convicted of violations of Penal Code 261, including unlawful sexual intercourse with a minor, because there was no admissible evidence to corroborate the statements in SSA's reports reciting Marcos' criminal history.

First, we must take exception to Marcos' characterization of the criminal history allegations contained in the petition as counts. The petition in this case alleges only three counts, each of which is sufficient, in and of itself, to support the assertion of jurisdiction in this case. Those are: (1) that the children have suffered, or are at substantial risk of suffering, serious physical harm inflicted non-accidentally upon them by their parent (§ 300, subd. (a)); (2) that the children have suffered, or are at substantial risk of suffering serious physical harm or illness due to the parent's failure to protect (§ 300, subd. (b)); and (3) that the children have been sexually abused, or are at substantial risk of being sexually abused (§ 300, subd. (c).) By contrast to those counts, what Marcos calls counts b-6 and d-6 are not intended as bases for jurisdiction; they are instead specifically identified in the petition as "*supporting facts*" alleged in connection with the latter two counts, respectively.

With that in mind, we turn to Marcos' argument. He asserts the court could not uphold these particular allegations in the absence of independent, corroborating evidence establishing the facts of his arrest and conviction on the Penal Code section 261 charge, because he objected to the admission of the portions of SSA's reports which detailed his criminal record. He claims that when such an objection is made, section 355, subdivision (c), precludes the court from finding the disputed facts to be true based solely upon the information contained in the report.

However, the language of section 355, subdivision (c), is somewhat narrower in its application than Marcos acknowledges. It does not entirely prevent the court from relying upon hearsay evidence contained in a social service report as the sole support for a fact. Instead, what it provides is that, subject to certain exceptions, "[i]f any party to the jurisdictional hearing raises a timely objection to the admission of specific hearsay evidence contained in a social study, the specific hearsay evidence shall not be sufficient by itself *to support a jurisdictional finding* or any *ultimate fact* upon which a jurisdictional finding is based."

The question, then, is whether Marcos' past charge and conviction for a crime involving sex with a minor qualify as "ultimate facts" in the context of this case. We conclude they are not. "[U]ltimate fact []" is a slippery term, but in general it refers to a core fact, such as an element of a claim or defense, *without which the claim or defense must fail*. . . . It is distinguished conceptually from 'evidentiary facts' and 'conclusions of law.'" (*Yield Dynamics, Inc. v. Tea Systems Corp.* (2007) 154 Cal.App.4th 547, 559, italics added.)

In this case, the only ultimate facts to be determined in connection with the petition's count alleging failure to protect were whether the children had suffered, or were at substantial risk of suffering, serious physical harm; and the only ultimate facts to be determined in connection with the petition's count alleging sexual abuse was whether the children had been sexually abused or were at substantial risk of being sexually abused. The issue of whether Marcos had been convicted of a sex crime 15 years previously, while possibly relevant to the assessment of those ultimate facts, is merely evidentiary. It is clearly not a "core fact . . . without which the claim or defense must fail." Consequently, nothing in section 355 precluded the court from relying on the statements in SSA's report as the sole basis for finding that fact to be true.

In any event, it is clear that even if the court did err by allowing the portions of SSA's reports detailing Marcos' criminal record to remain in evidence without corroboration, the error was harmless. "[E]ven if error is demonstrated it will rarely warrant reversal unless it appears 'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Watson* (1956) 46 Cal.2d 818, 836; see Cal. Const., art. 6, § 13.) This means the appellant must show not only that error occurred but that it is likely to have affected the outcome." (*Yield Dynamics, Inc. v. Tea Systems Corp.*, *supra*, 154 Cal.App.4th at p. 557.)

Here, it would be impossible to conclude that it was the evidence that Marcos had a 15-year-old conviction for a sexual crime, rather than the credible evidence that he had molested his stepson within the past few years, and was *currently* abusing his stepdaughter, which prompted the juvenile court to sustain the sexual abuse count as a basis for jurisdiction in this case. Given that the court actually *believed* that the more recent sexual abuse had taken place, it would hardly need the additional evidence that Marcos had engaged in *past* sex crimes to reach the conclusion that Marcos posed a *current* danger to the other children in the home. Consequently, we conclude that even if the court had erred in sustaining the factual allegation regarding that past conviction, that error could not have affected the outcome of the jurisdictional hearing.

III

Finally, even assuming Marcos had convinced us to entirely disregard the issue of sexual abuse in this case, he would not prevail on this appeal. For as SSA points out, Marcos did not challenge the court's findings regarding physical abuse, domestic violence, and drug abuse. Consequently, even in the absence of sexual abuse, the petition's counts alleging that jurisdiction is proper based upon failure to protect (§ 300, subd. (b)); and substantial risk that the children may suffer physical harm (§ 300, subd. (a)) are each independently sufficient to justify the court's decision to take jurisdiction in this case.

And as SSA correctly asserts, where the unchallenged bases for jurisdiction are independently sufficient to support the jurisdictional order, that order will not be reversed on appeal simply because the court also based it on additional conclusions which cannot properly be sustained. "When reviewing a judgment based in part on excludable evidence, we first strip away the inadmissible evidence and ask whether enough admissible evidence remains to sustain the court's finding." (*In re Daniel C.H.* (1990) 220 Cal.App.3d 814, 837.) In this case, the evidence which was indisputably admissible is more than sufficient to support the jurisdictional order.

The order is affirmed.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.